

Nicole Marie Abarca
AZ Bar No. 030662
Carlos Daniel Carrion
AZ Bar No. 011187
Maricopa County
Public Defender's Office
620 West Jackson Street, Suite 4015
Phoenix, Arizona 85003-2423
(602) 506-7711

In the Matter of:

Petition to Add Subsection 32.13 to Rule
32 of the Arizona Rules of Criminal
Procedure

No. R-15-0029

**COMMENT OF THE MARICOPA
COUNTY PUBLIC DEFENDER'S
OFFICE TO THE PROPOSED
ADDITION OF SUBSECTION 32.13
TO THE ARIZONA RULES OF
CRIMINAL PROCEDURE**

The Maricopa County Public Defender's Office ("MCPD"), opposes the Petition to Add a New Subsection, Rule 32.13, to the Arizona Rules of Criminal Procedure.

DISCUSSION

The Petitioner filed an Amended Petition on January 15, 2015. Within the Amended Petition, the Petitioner attempted to address various comments by judges and attorneys. The Petitioner, however, did not adequately address many concerns. The Maricopa County Public Defender's Office ("MCPD") is in opposition of the Petition. The Petitioner, in an attempt to make the process shorter and more efficient, limits defendants' access to justice.

Article 2 § 24 of the Arizona Constitution provides that an accused in a criminal prosecution has the “right to appeal in all cases.” Post-conviction relief is the last and only form of review in the majority of cases due to the waiver of appellate rights contained in the plea agreement. However, constitutional protections such as the right to effective assistance of counsel, the right to be sentenced in accordance with the law and many others are not among the myriad of rights pleading defendants waive. Nor are there distinctions regarding those rights based on the nature of the offense or whether the conviction is a result of a plea or trial. *See* Ariz. R. Crim. P. 17.2. Because defendants who plead guilty waive the right to appeal directly to an appellate court, Rule 32 provides “the only means available for exercising the constitutional right to appellate review.” *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616, *supp. op.*, 182 Ariz. 118, 893 P.2d 1281 (1995). The scope of relief provided by Rule 32 relief must be interpreted liberally in allowance for elimination of the right to appeal following a guilty plea. *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995).

I. The current rule proposal presupposes subsections 32.2 – 32.12 do not apply to limited jurisdiction courts.

The proposed addition to Rule 32 is silent on many issues such as: time limits for rulings, summary disposition, assignment of judicial officer for ruling, extensions of time for filing a petition, notice of completion and subsequent filing of pro per petition, burden defendant must meet, intellectual disability determination, the declaration, necessary distinctions regarding successive or untimely petitions, what occurs when a non-compliant petition is filed and whether a defendant may remedy the defect to name a few.

If the petitioner intended any section of Rule 32 in its current state to be incorporated into the proposed new 32.13¹, it should be explicitly stated.

Cases carrying the harshest punishment possible, the death penalty, require distinctions be made. Post-conviction relief is not a one-size-fits-all mechanism for review. However, if distinctions must be made for limited jurisdiction courts, these distinctions, just as they do for capital cases, should be woven into the relevant section of the existing rule.² Failing to do so would create unnecessary confusion and redundancy.

II. Eliminating the notice of post-conviction relief eliminates a crucial part of the process and is a step backwards.

On July 31, 1991, the Supreme Court appointed a 17-member committee charged with making recommendations regarding changes to Rule 32. The committee completed its work December 17, 1991 and filed R 92-0002, Petition to Amend Rule 32, Arizona Rules of Criminal Procedure. One notable change that was proposed was the addition of the notice of post-conviction relief in lieu of defendants initially filing a petition. The change was adopted and went into effect December 1, 1992 pursuant to Order Amending Rule 32, Arizona Rules of Criminal Procedure filed June 2, 1992. The current rule proposal, if adopted, would return what R 92-0002 refers to as the “old system” which they deemed counterproductive and “did not insure finality for the victims of crimes.” The committee likens the notice of post-conviction relief to the notice of appeal and how it would serve as a procedural mechanism to alert the trial court to begin the post-conviction relief

¹ Proposed 32.13(a) states: “The grounds for relief shall be those set forth in Rule 32.1(a)” but the proposal is silent as to the remaining sections contained in the existing rule.

² See attached Appendix 1. If the Court finds distinctions appropriate, where and how they should be incorporated in the existing Rule is attached.

process. (R 92-0002, pages 14-15 lines 5-2). The Petition R 92-0002 filed January 29, 1992 and the Order Amending Rule 32, Arizona Rules of Criminal Procedure filed June 2, 1992 are attached hereto as Appendix 2 and 3. This change to Rule 32, initiating the process with a notice of post-conviction relief, was successfully implemented and has been in place since 1992.

III. A Motion to Withdraw from a Plea Agreement pursuant to Rule 17.5 can not be a substitute for collateral review, nor can failure to file said motion waive a defendant's right to collateral review.

It is our responsibility under the Constitution to ensure that no criminal defendant is left to the "mercies of incompetent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970). Post-conviction relief is the only form of review for a pleading defendant. Further, in Arizona, defendants are precluded from raising a claim grounded in Sixth Amendment right to effective assistance of counsel in any other proceeding.

Denying a defendant the right to pursue post-conviction relief is inconsistent with the Arizona Constitution and United States Constitution. Below are cases that illustrate examples of issues commonly raised in a petition for post-conviction relief that are outside the scope of Rule 17.5. There is no procedural equivalent to Rule 32, and Rule 17.5 is certainly not a substitute. Rule 17.5 is far more narrow and does not cover the range of issues that can be remedied in a Rule 32 proceeding.

- In the context of a claim of involuntary guilty plea, the prejudice prong is satisfied if the defendant demonstrates a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted

on going to trial. *State v. Ysea*, 191 Ariz. 372, 956 P.2d 499 (1988); *State v. Bowers*, 192 Ariz. 419, 966 P.2d 1023 (App. 1998), review denied.

- As a general rule, the defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused to render the effective assistance the Constitution requires. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and that right applies to “all ‘critical’ stages of the criminal proceeding.” *Missouri v. Frye*, 132 S.Ct. 1399 (2012). In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).³

Issues such as these in addition to all other constitutional and due process claims, and any claims pursuant to Rule 32.1(b) – (h) cannot be addressed in a motion to withdraw from a plea agreement. Further, a defendant can never be precluded from filing a petition grounded in claims raised under Rule 32.1(d)-(h), as these claims are exempt from the timeliness requirement.

IV. Maricopa County Public Defender’s Office Response to Proposed “Amended Rule 28 Petition Re: Limited Court PCR Procedure, New Subsection Rule 32.13.”

³ Limited jurisdiction courts do not subscribe to formal *Donald* advisements. Thus, prompting the inclusion of cases like *Frye* and *Lafler*, neither of which constituted a change of law in Arizona as this state has long since recognized that the right to effective assistance of counsel extends to the plea bargain process. *State v. Donald*, 198 Ariz. 406, 413, 10 P.3d 1193, 1200 (App. 2000).

The following subsections of this comment mirror the proposed subsections of the Amended Petition filed January 15, 2015. The Maricopa County Public Defender's Office responds as follows:

a. Response to Proposed 32.13(a): Grounds; Time Limits: Preclusion.

1. The proposed subsection incorporates Rule 32.1 by reference and then proceeds to include portions of Rule 32.2 (Preclusion of Remedy) and Rule 32.4 (Commencement of Proceedings). The time frame proposed is shorter, giving 60 days to prepare a petition for post-conviction relief as opposed to ninety and eliminates the filing of a notice of post-conviction relief to initiate a Rule 32 proceeding. The filing of a notice, like a notice of appeal, serves many purposes and renders the process more efficient. *See Supra*.

2. Foreclosing the ability to pursue post-conviction relief while a direct appeal is pending may prolong the process and delay finality. The Supreme Court has pointed out potential benefit in the way of timeliness if an appeal and Rule 32 proceeding are done at the same time. This rationale applies to both capital and non-capital Rule 32 proceedings and would also apply to limited jurisdiction courts. Rule 32.4(a) does not preclude a defendant under sentence of death from filing a notice of post-conviction relief before his direct appeal is concluded. Nor will such early filing preclude the clerk's later automatic filing under Rule 32.4(a) if the death penalty is affirmed; in capital cases. In a given case, an early Rule 32 proceeding could make consideration of the direct appeal

moot and could hasten the start of a new trial or other resolution of the case. *Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995).

3. Striking all untimely petitions is inappropriate and denies defendants their right to review. The claims should be addressed on the merits as being precluded due to being untimely or raised in a successive petition. Claims that are not precluded need to be addressed on the merits. The proposed subsection is silent on the striking of a non-compliant petition (one that does not comply with Rule 32.5). This is already addressed in 32.5, and should be included in the proposed subsection as well.

Response to Proposed Comments to Rule 32.13(a).

1. If a case is pending direct appeal, the ability to pursue post-conviction relief is not stayed. There is no mechanism for a stay in Rule 32, nor does a direct appeal strip the trial court of its ability to consider issues raised in a petition for post-conviction relief. This capacity to bring a Rule 32 proceeding to immediate resolution promotes efficiency and finality. Initiating a Rule 32 proceeding prior to the conclusion of a direct appeal would be especially important in a hypothetical situation where evidence to support a claim under Rule 32.1(h)⁴ is uncovered, potentially vacating the conviction and sentence. To provide relief without undue delay, these claims should be raised regardless of whether appeal is pending.

2. The Petition states 95% of cases resolve by plea. Petitioner is correct in asserting that Rule 17.5 provides an avenue of relief if a plea does not meet constitutional

⁴“The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.” Ariz. R. Crim. P. 32.1(h).

standards. However, there are many other constitutional protections that are still in place. Failure to seek relief pursuant to Rule 17.5 should not preclude a defendant from pursuing the only mechanism they have to exercise their constitutional right to appellate review. A petition containing substantive claims is not at all analogous to a notice of appeal. *See Supra*.

3. The comment also attempts to ensure proper notice forms are modified. This is imperative; the colloquy at sentencing and plea acceptance should reflect the applicable time frames. The court should always ensure that notice is given at sentencing since all defendants must be present at the time of sentencing.

b. Response to Proposed 32.13(b): Commencement of Proceedings; Contents; Length; Response.

1. Rule 32.4(a) states that the court must provide forms. The proposed subsection is silent as to this issue as well. Commencement with a substantive petition is not appropriate. *See Supra*. The current notice of post-conviction relief and petition for post-conviction relief forms accommodate cases originating from limited jurisdiction courts as well. The creation of additional forms is redundant and would likely create unnecessary confusion.

2. The Petitioner proposes supplemental petitions be prohibited without leave of the court. The meaning of this is unclear: does the Petitioner intend to say an amended petition (currently addressed by Rule 32.6(d)) or a supplement to the initial petition. Current Rule 32 proceedings, and their respective pleadings, do not contain supplements. An amended petition completely replaces the initial petition filed.

3. The State may receive an enlargement of time for good cause, but there is no provision for an enlargement of time to file a petition. Rule 32.4(c)(2) provides a mechanism by which a defendant may request an extension of time on a showing of good cause in two places; one for counsel and subsequently for pro per defendants. The rule should provide a mechanism to request an extension of time to file a petition and what must be shown.

4. Current Rule 32.6(a) requires the State to file a response. Requiring the State to file a response helps prevent undue delay. The filing of a response, or a pleading notifying the court the State is taking no position, accelerates the process. In addition, as a practical matter, it would be difficult to imagine a scenario where the court would consider granting a petition for post-conviction relief without the State having responded.

Response to Proposed Comments to 32.13(b).

Petitioner's assertion that "the content of the petition need not set forth papers and pleadings within the judicial knowledge of the court file and should not require extensive elaboration" is impracticable. Most claims, even those based on items that may be found in the court's record, typically need extensive elaboration. Assuming that a pro per defendant will know what is in the court file and how to incorporate those items by reference seems unrealistic. Current Rule 32 does not require items in the record be attached. Attaching items that support claims raised to the pleading provides the judicial officer with easier access and promotes judicial efficiency. This is true whether it be a motion or petition for post-conviction relief or any pleading requiring reference to additional documents in order for a judge to rule. Further, the overwhelming majority of

claims that result in post-conviction relief being granted are due to the development of facts that were not included in the record. This ability to expand the record is unique to post-conviction relief. In *State v. Russell*, 175 Ariz. 529 (App. 1993), the court observed, as a preliminary matter, matters that require an extended record to resolve should normally be brought in a Rule 32 proceeding. See *State v. Crowder*, 155 Ariz. 747 P.2d 1176 (1987). Further, the 18-page limit should not include all attachments, exhibits and any appendices. Eliminating record expansion not only limits access to justice but negates the unique beauty of Rule 32 in allowing defendants and attorneys to use and develop claims based on evidence not presented at trial or during trial phase.

c. Response to Proposed 32.13(c): Limited Transcript Use; Right to Court Appointed Counsel Conditional on Original Charges.

1. A majority of the Superior Courts are silent as to whether or when a record should be transcribed for appellate review of the limited jurisdiction court proceedings. Two require transcription if the record is in excess of one hour⁵ while only Maricopa County requires transcription if the record is in excess of one hour and a half.⁶ First, it is recommended that a definition of what constitutes the record to be transcribed. Second, it is recommended the record shall be transcribed if it is in excess of one hour unless local rules state otherwise.⁷

⁵ The Superior Court Local Practice Rules (Local Rules) of Gila County (Rule 32(B)(effective July 1, 1999) and Graham County (Rule 1.19(B)(effective June 9, 2005) require record in excess of 1 hour or ordered by the court to be transcribed.

⁶ Rule 9.4(b)(effective July 1, 2013), Maricopa County Local Rules states: "The verbatim record in limited jurisdiction courts may consist of audio, video, digital, transcription, or other method of recording as approved by the Supreme Court. Verbatim records of ninety (90) minutes or more in total length or duration must be transcribed into a written format."

⁷ "If the proceeding was more than one hour, a few of the Superior Courts will require the recording to be transcribed." Representing Yourself: Appealing a Criminal Case to the Superior Court, p. 7 (June 2008).

Noting that the use of audio, video, or digital record in a Rule 32 proceeding in limited jurisdiction courts would be appropriate, especially since lower court appeals is using this format now. However, this can easily be accomplished by adding to current Rule 32.4(d) as there are proceedings that may still require transcripts to be prepared.

2. Counsel should be its own section. Once a notice is filed, if a defendant was entitled to counsel during the trial phase, he is entitled to counsel during a Rule 32 proceeding. Requiring defendants to submit a motion to request counsel will only increase the length of time it will take the proceeding to come to finality and generate more pleadings. Further, a pleading defendant is constitutionally entitled to effective assistance of counsel on his first of-right petition for post-conviction relief, the counterpart of direct appeal. *State v. Perry*, 225 Ariz. 369, 238 P.3d 637 (App. 2010).

Where, under state law, ineffective assistance of trial counsel claims must be raised in an initial collateral review proceeding (a Rule 32 proceeding), a procedural default will not bar a federal court from hearing those claims under two circumstance: 1) no counsel was appointed, or 2) counsel was ineffective. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

Arizona, even prior to *Martinez*, recognized the importance of effective assistance of post-conviction relief counsel. Rule 32.4 entitles an indigent defendant to appointment of counsel for defendant's second, timely filed post-conviction proceeding, so that the defendant may investigate and possibly bring a claim that in defendant's first, "of-right" PCR proceeding, his counsel provided ineffective assistance. *Osterkamp v. Browning*, 226 Ariz. 485, 250 P.3d 551 (App. 2011).

Response to Proposed Comments to Rule 32.13(c).

1. If a defendant was not entitled to counsel during the trial phase then there is a basis to deny counsel during the Rule 32 proceeding. Making an extra step (another result of eliminating the notice) for the defendants in a pro per initiated process creates more paperwork and is less efficient.

2. The proposed subsection says nothing about the time frames regarding petition due dates if counsel is appointed, or whether time spent obtaining transcripts tolls the time for the filing of the petition.

d. Response to Proposed 32.13(d): Oral Argument and Evidentiary Hearings.

1. The assessment of whether a colorable claim has been presented, and then whether an evidentiary hearing is needed should be in the discretion of the judicial officer. Every defendant will request a hearing if the Rule permits for it. This will create extra pleadings and take away from the judicial officer from what his or her duty is.

To state a colorable claim, a defendant must allege specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision. To achieve a hearing, a defendant must present more than a conclusory assertion that counsel failed to adequately communicate the plea offer or the consequences of conviction. A petition must provide specific factual allegations that, if true, would entitle him to relief. *State v. Donald*, 198 Ariz. 406, 10 P.3d 1139(App. 2000), review denied; *State v. Bowers*, 192 Ariz. 419, 966 P.2d 1023 (App. 1998), review denied.

2. Current Rule 32.6(c) gives specific direction on this issue stating the court must review the petition and other documents within 20 days after the defendant's reply was due. First, the court must identify all claims that are procedurally precluded. Second, the court must determine whether any of the remaining claims present a material issue of fact or law that would entitle the defendant to relief. If the court determines none of the remaining claims present a material issue of fact or law and that no purpose would be served by any further proceedings, the petition must be summarily dismissed. If the court determines that one or more of the remaining claims present a material issue of fact or law, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law.

Response to Proposed Comments to Rule 32.12(d).

The best way to ensure that defendants are not embarking on fishing expeditions is to leave the current process, which leaves whether an evidentiary hearing is set in the discretion of the judicial officer. In fact, defendants are currently precluded from re-litigating such claimed trial errors unless counsel's failure to raise the issue is so egregious as to constitute ineffective assistance. *State v. French*, 198 Ariz. 119, 7 P3d 128 (App. 2000).

After review of a petition, if a ruling is made and an evidentiary hearing is not set the judicial officer may indicate a hearing was not warranted or necessary.

- e. **Response to Proposed 32.13 (e): Summary Disposition; No Motion for Rehearing; Format; Distribution; Notices.**

1. Petitioner fails to provide time frames in which the court must rule. This lack of time frame would permit Rule 32 proceedings to languish without ruling. Thus, leaving parties and victims involved in limbo as to when finality may occur.

2. There is virtually no other petition or motion in criminal procedure where asking the court to reconsider its ruling is not permitted. Further, forcing every potential error, issue or oversight to the appellate court is an inefficient way to handle issues that the trial court may be able to resolve.

Response to Proposed Comments to Rule 32.13(e).

Referring to the nature and mitigated severity of risk (i.e. assault, domestic violence, prostitution, driving under the influence, shoplifting) of misdemeanors and petty offenses does not change the constitutional protections of those who bear the weight of the State against them, nor does it change the impact on victims and their rights. Petitioner fails to set forth sufficient legal or policy based reasons to support that the proposed changes are needed to prevent undue expense of delay or inefficient use of judicial resources or how the current rule is inadequate to address the needs of limited jurisdiction courts.

f. Alternative if Rule is Amended.

If it is deemed necessary to change the Rule to accommodate the needs of limited jurisdiction courts, the additions should be woven into the existing Rule. Attached as Appendix 1 is current Rule 32 with the following revisions inserted in their respective sections:

- 60 days to file notice – instead of 90
- 18 pages instead of 25 (not inclusive of attachments, exhibits, etc.)

- No reply and shorten response time to 30 days
- Transcripts to include audio, video, or digital record for proceedings less than 60 minutes
- No reply re: motion for rehearing/reconsideration
- 32.4(c)(3) – add counsel for limited jurisdiction court assessment as to whether the defendant is entitled, indigent costs covered and state that in the interests of justice counsel may be appointed at any time regardless of whether the defendant would have been entitled to counsel during trial phase

CONCLUSION

For the reasons stated above, the State Bar's initial comment to the proposed amendment contained valid concerns regarding the rights of criminal defendants and attorneys in Arizona. The Maricopa County Public Defender's Office is in strong opposition to the proposed addition of subsection 32.13.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE

By /s/ Nicole Marie Abarca
NICOLE MARIE ABARCA
AZ Bar No. 030662

By /s/ Carlos Daniel Carrion
CARLOS DANIEL CARRION
AZ Bar No. 011187